of necessity, be constantly assessed to take into account the evolving nature of telecommunications. In all of its universal service decisions, a paramount goal of the Commission has been to ensure that all Americans have access to telecommunications services at reasonable rates.

In pursuing its universal service goals with respect to under-represented, socially-disadvantaged and minority communities it is wholly appropriate for the Commission to consider whether minority ownership initiatives would promote its universal service goals. Based on the historic and documented willingness of minority-owned firms to target their services to the needs of minority communities (communities that, as noted above, are often by-passed by majority-owned firms), it is clearly appropriate for the Commission to consider the promotion of minority ownership as a means of promoting universal service. 78/

The record also demonstrates that minority ownership yields different types of programming and services more tailored to minority communities. 79/ Thus, promoting minority ownership could yield different and richer contributions to universal service than would be realized if the FCC merely endeavored to promote minority-oriented programming without seeking to promote minority ownership.

78/ Furthermore, universal service has been suggested as the basis for governmental efforts to provide resources and services to those otherwise unable to secure access to advanced telecommunications technologies. *See* Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of "Universal Service," 26 Hastings Comm. & Ent. L.J. 1 (2003).

79/ *See* Bachen, Hammond Study and Mason, Bachen & Craft, Support for FCC A Minority Ownership Policy: How Broadcast Station Owner Race or Ethnicity Affects News and Public Affairs Programming Diversity, Communications Law and Policy, 2001, Vol. 6, no. 1, pages 37-73 (minority owned radio stations cover more topics presumed to be of interest to ethnic or racial minority audiences.)

D. Promoting Competition Through the Wide Dissemination of Spectrum Licenses

The Commission's interest in disseminating spectrum licenses widely, as a means of promoting competition, might also qualify as compelling. Congress and the Commission have long recognized the need to ensure that spectrum licenses are not unduly concentrated in the hands of a few, well-capitalized companies. When spectrum license holdings are widely dispersed, consumers and the economy as a whole benefit from lower prices, increased innovation and an increased focus on the delivery of new and important niche services. 80/

In the debate leading up to the enactment of the Commission's Section 309(j) spectrum license auction authority, Congress expressed the concern that without sufficient safeguards a licensing regime that used high-bidder status as a proxy for determining which applicants are best qualified to hold spectrum licenses would undermine the achievement of Congress's competition policy goals. According to a 1993 House Budget Committee Report on the legislation that ultimately became the Omnibus Budget Reconciliation Act of 1993:

> The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries. 81/

The report went on to state:

> One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with 'deep pockets,' and would therefore have the wherewithal to participate in the bidding process. This

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80/ *See Section 257 Report* at ¶221 (1997)(noting that "small businesses not only constitute the vast majority of all employers in this country, but are able to innovate faster than larger firms and to serve niche markets that may not be served by large corporations.")

81/ H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993).

> would have the effect of favoring incumbents, with established revenue streams, over new companies or start-ups. 82/

On that basis, and in an effort to ensure that all segments of society have an opportunity to access auctionable spectrum in a manner that promotes competition, Congress, as part of the grant of auction authority under Section 309(j), directed the Commission to promote the dissemination of "licenses among a wide variety of applicants, including . . . businesses owned by members of minority groups and women." 83/ Congress also required the Commission, in promulgating its competitive bidding regulations, to "prescribe area designations and bandwidth assignments that promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups and women. 84/ Most significantly, Congress required the Commission to "ensure that . . . businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services …." 85/

In implementing its Section 309(j) competitive bidding authority, the Commission followed Congress's lead in avoiding excessive concentration of spectrum licenses. In fact, when auctioning spectrum for broadband PCS, one of the first major spectrum-based services to be sold pursuant to Section 309(j), the Commission set aside some spectrum in that service for closed bidding by small businesses, stating:

> We agree [with Congress] that small entities stand little chance of acquiring licenses . . . if required to bid against existing large

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82/ *Id.* at 255.

83/ 47 U.S.C. § 309(j)(3)(B).

84/ 47 U.S.C. § 309(j)(4)(C).

85/ 47 U.S.C. § 309(j)(4)(D).

> companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. 86/

It is noteworthy that the Commission also indicated its belief that Congress's mandate to provide meaningful opportunities for minorities could not be accomplished without special race-based provisions to compensate for the impact competitive bidding (including the capital required to bid) would have on the ability of most minority-owned companies to acquire spectrum licenses. Noting that prior to the enactment of section 309(j), Congress had made findings regarding the difficulties encountered by minorities in accessing capital, and acknowledging various studies documenting the widespread existence of lending discrimination against minorities, 87/ the Commission stated:

> Women and minorities face discrimination in lending and other barriers to entry not encountered by other firms, including other [small businesses]. Therefore, as one of the measures designed to counter these capital formation difficulties, we will provide them with a slightly higher bidding credit than that granted to small businesses. . . . Absent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of broadband PCS. 88/

86/ *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Fifth Report & Order, 9 FCC Rcd 5532, 5585(1994) at ¶ 121.

87/ *Id.* at ¶ 98.

88/ *Id.* at ¶132. The fact that the Commission felt it necessary, in view of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to race-based governmental classifications), to make its minority-specific incentives race neutral does not detract from its determination that race-specific incentives were needed to ensure that minorities had a meaningful opportunity to participate in the provision of spectrum-based services.

A finding that promoting competition and the wide dissemination of spectrum licenses constitutes a compelling interest is also supported by Congress's enactment, and the Commission's implementation, of Section 257. Section 257 requires the Commission to identify market entry barriers that prevent small businesses and entrepreneurs from providing telecommunications and information services. 89/ In carrying out the mandate, Congress directed that the Commission "seek to promote the policies and purpose of [the Communications Act] favoring ... vigorous economic competition, technological advancement, and the promotion of the public interest, convenience and necessity." 90/ It should be noted that in issuing its first Section 257 report the Commission stated that because of the problems encountered by minorities in accessing capital, including the lending discrimination noted above, auctions "threaten to erect another barrier to participation by . . . businesses owned by minorities . . . by raising the costs of entry into spectrum-based services." 91/

Moreover, classic economic theory suggests that an artificially depressed level of any input to economic production diminishes the industry's competitiveness, which in turn increases costs borne by consumers. And the Supreme Court has left open the question of whether promoting competition and reasonable rates might be a compelling governmental interest justifying narrowly-tailored race-conscious measures. 92/ In the spectrum-based

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89/ 47 U.S.C. § 257(a).

90/ 47 U.S.C. § 257(b).

91/ *Section 257 Report*, 12 FCC Rcd at 16878.

92/ In *NAACP v. FPC*, 425 U.S. 662, 670 (1976), the Court found that the public interest standard in the Power and Gas Acts was "a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." Thus, it affirmed the D.C. Circuit's holding that the FPC could, but was not required to, conclude that "excessive services, minority talent is often unable to attain its full potential through deployment in ownership and senior management. Inevitably, this underutilization of minority talent diminishes the competitiveness of the industry and increases costs to consumers.

In view of the competitive goals of Congress and the Commission, and the track-record of minority-owned businesses in providing niche services, services to un-served and underserved communities and attractive pricing schemes not otherwise provided by non-minority firms, it is wholly appropriate for the Commission to consider whether the promotion of competition could be deemed a compelling governmental interest for purposes of strict scrutiny.

IV. Any FCC Race-Based Incentive Must Be Narrowly Tailored

Strict scrutiny requires not only that consideration of race be justified by a compelling interest, but the use of race must also be narrowly tailored to accomplish the compelling purpose. The Supreme Court has looked to four aspects of race-conscious measures

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labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against" was "arguably within the Commission's range of concern" that "no unnecessary or illegitimate costs are passed along to that consumer." *NAACP v. FPC*, 520 F.2d 432, 444 (D.C. Cir. 1975). The public interest standard and substantive objectives applicable to spectrum in the Communications Act are closely analogous to the public interest standard and substantive objectives of the Power and Gas Acts. *Compare* 47 U.S.C. §151 (1996) with 16 U.S.C. §824d (1975) (requiring FPC to establish just and reasonable rates for the transmission and sale of electrical energy) and 15 U.S.C. §717c (1975) (requiring FPC to establish just and reasonable rates for the transmission and sale of natural gas). Thus, it appears that the FCC could conclude that the elimination of market entry barriers, such as racial discrimination, or the promotion of minority ownership, could advance the Communications Act's objectives of promoting competition and reasonable rates. It could also enhance the Communications Act's objective of recovering for the public a portion of the spectrum's value. *See* 47 U.S.C. § 209(j)(13). Ian Ayres and Peter Cramton in their study of the FCC's Regional Narrowband Paging auction, reported that the incentives for minorities and women, including installment payments, yielded higher auction revenues when minority and women-owned firms competed against incumbents. They conclude that auction revenues might have been artificially depressed without this enhanced competition. *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 Stan. L. Rev. 761 (1996).

to determine whether they satisfy narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of third parties." 93/

The factor of necessity of relief and efficacy of alternatives considers whether race-conscious means are needed and, in that regard, whether consideration was given to race-neutral alternatives that as effectively would serve the compelling purpose. "Narrow tailoring ... require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve" the compelling interest. 94/

The factor of flexibility and duration of the measure, including waiver provisions, examines whether consideration of race is flexible, not rigid or solely determinative, and is afforded in a context of individualized consideration of applicants regarding all relevant factors, rather than insulating some applicants from competition with others. 95/

Inquiry into the relationship between numerical goals and appropriate measures of the interest to be served by the compelling that interest is to ensure that "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." 96/ Thus, any numerical goals employed cannot be over-inclusive and

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93/ *U.S. v. Paradise*, 480 U.S. 149, 171 (1987) (citations omitted).

94/ *Grutter*, 539 U.S. at 339; *Croson*, 488 U.S. at 507, *Wygant*, 476 U.S. at 280, fn. 6.

95/ The Supreme Court has recognized that, in some circumstances, numerical requirements can be imposed on the distribution of benefits, subject to the narrow tailoring considerations described here. See *Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Paradise*, 480 U.S. 149.

96/ *Paradise* at 333 quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996).

must be tailored to achievement of the legitimate goal and not simple "racial balancing." 97/ Goals premised on the remedial interest are appropriate where they focus on eliminating under-representation in positions taking into account appropriate measures of availability for those positions. 98/ With respect to plans designed to achieve diversity, the inquiry is focused on the "relationship between numbers and achieving the benefits to be derived from … divers[ity] …," and a "goal of attaining a critical mass of underrepresented minorit[ies]" and "'[s]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." 99/

Finally, narrow tailoring requires an assessment of the impact of the relief on the rights of third parties "to assure that [the measures] will work the least harm possible to other innocent persons competing for the benefit," and that those not favored by the measures are not "unduly burden[ed]." 100/ In cases where "set-asides" are appropriate, this interest is served where "[t]he plan does not require the discharge of white workers and their replacement" and where no "absolute bar to the advancement" of others is created, and the measures are otherwise narrowly tailored. 101/ In other contexts, this concern is satisfied where, in service of appropriate goals, "race or ethnic background may be deemed a 'plus,'" but "[*n*]*o* persons are

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97/ *Croson*, 488 U.S. at 506-07.

98/ *Johnson*, 480 U.S. at 635, 639-40: *id.*, at 654 (O'Connor, J, concurring in the judgment); see *Croson*, 488 U.S. at 501-02, 507.

99/ *Grutter*, 539 U.S. at 335-36 quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 323 (opinion of Powell, J.).

100/ *Grutter* at 341(internal quotations and citations omitted).

101/ See *Steelworkers*, 443 U.S. at 208-09; see *Paradise*, 480 U.S. at 208-09.

automatically excluded from consideration and] *all* are able to have their qualifications weighed against those of other applicants." 102/

V. Summary of the Section 257 Studies and their Relevance for Strict Scrutiny

The Section 257 studies focus on the barriers confronting minorities who wish to participate in the broadcast and wireless industries, including barriers associated with the Commission's licensing process. As noted above, Section III of these comments refers to these studies. In addition, the two declarations attached to these comments (the Henderson and Hammond, Sandoval declarations) analyze extensively the results of the studies, as well as the results of other relevant studies, observations, publications and materials, and indicate in detail why such studies support the implementation of race-conscious and race-neutral policies to increase minority ownership. A brief overview of the Section 257 studies, and their relevance to potential compelling interests and narrow tailoring considerations, appears below.

A. Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes, By William D. Bradford, Ph.D., December 5, 2000 (referred to above and throughout as the "Capital Markets and Auctions Regression Study")

As noted above, this study lends credence to the complaints often voiced by prospective minority license owners that racial discrimination exists in the capital markets. Because the FCC's current spectrum licensing regime and the secondary market requires that most spectrum licenses be purchased, discrimination in the capital markets makes it extremely difficult for minorities to obtain spectrum licenses. The study provides possible support for the assertion of a compelling governmental interest in remedying the FCC's passive participation in discrimination against minorities in the capital markets. The study concludes that without a

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102/ *Johnson*, 480 U.S. at 637-38; *id.*, at 655-56 (O'Connor, J, concurring in the judgment).

remedy for capital market discrimination, minority and women-owned businesses will be disadvantaged in seeking to acquire auctioned FCC broadcast and wireless licenses, compared to non-minority applicants.

The study finds that minority broadcast and wireless license holders are less likely to receive debt financing than non-minority-owned firms, after controlling for the effect of other variables on the lending decision. It also finds that applications for debt financing from female broadcast applicants are less likely to be approved, but the finding is not statistically significant. However, for female wireless applicants, their decreased likelihood of obtaining debt financing is statistically significant.

B. Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC, By KPMG LLP, Economic Consulting Services, November 2000 (referred to above and throughout as a component of the "Broadcasting Licensing Study")

This study is relevant for narrow tailoring considerations in determining the effectiveness of race- or gender-conscious policies on broadcast license awards. The study measures license award rates by gender and race during periods of time when the FCC's stated policy was to provide preferences to minorities and women. From the 1940's until 1993, the FCC used comparative hearings to assign broadcast licenses when more than one person applied for a license. Minority participation in station ownership was taken into account by the FCC evaluation after 1974.

The analysis indicates that minorities acquired licenses at a higher rate than non-minorities during the study period, although the results varied by racial or ethnic group. However, when minority participation was defined by majority equity ownership in the application, minorities won more radio licenses, but fewer television licenses than non-minorities. Women won both more radio and television licenses in concert with their equity participation.

One could conclude from this study that the FCC minority preferences were effective for African-Americans in winning radio and television licenses through comparative hearings, although they were far less effective for Native Americans. Hispanic success in obtaining radio licenses was slightly lower.

C. Logistic Regression Models of the Broadcast License Award Process For Licenses Awarded by the FCC, By KPMG LLP, November 2000 (referred to above and throughout as a component of the "Broadcasting Licensing Study")

As noted above, this study supports a compelling interest in remedying past governmental action that may have discriminated against minorities, and is relevant for narrow tailoring considerations. It describes how the FCC judged minority financial liabilities more harshly in comparative hearings than non-minority financial liabilities. The study analyzed a sample of comparative hearings during the time of minority preferences from 1978-1981 and 1989-1993. The study found that during that period both minority and female participation increased the likelihood of a license award. However, the positive presence diminished as the percentage of female and minority participation increased.

The study also found, however, that minority participation, when defined by percentage ownership or majority ownership, did not significantly influence the probability of acquiring a license, while minority participation by applicant count did. For women, both female equity and females in the application increased the likelihood of winning.

D. FCC Econometric Analysis of Potential Discrimination; Utilization Ratios for Minority-and Women-Owned Companies in FCC Wireless Spectrum Auctions, By Ernst & Young LLP, December 2000 (referred to above and throughout as the "Auction Utilization Study")

As noted above, this study provides possible support for the assertion of a compelling interest in remedying the FCC's passive participation in industry-wide and capital markets discrimination. The study is also relevant for narrowly-tailoring a remedy based on the effectiveness of race- or gender-conscious policies (compared to race-neutral policies) on spectrum license awards. The study examines the success of minority and women-owned businesses in the FCC wireless spectrum auctions, finding that at a statistically significant level, minority and women applicants were less likely to win at least one license relative to other applicants, measured by the percentage of auction winners (those who obtained at least one license) among all auction applicants.

The study also examines the percentage of minority auction applicants who qualified to bid. Applicants had to qualify by submitting a sufficient upfront payment in advance of the auction, after their initial filing with the FCC indicating their interest in participating. The study found that minority and women applicants qualified at lower rates than other applicants, and that those differences were statistically significant. Small minority and women-owned firms qualified at statistically lower rates than other small firms, and large minority and women-owned firms also experienced lower qualification rates than their large counterparts. However, minority applicants who qualified to participate in the auction had higher success rates than non-minorities.

When the auctions were compared by whether or not the FCC offered installment payments (and thus, the ability to pay for the license bid over a period of time, as opposed to within a couple of months after the close of the auction) minority success rates were altered dramatically. In auctions with installment payments, minorities had a higher success rate than non-minorities, whereas in auctions where installment payments were not available, minorities had a much lower success rate than non-minorities. The study recommends further analysis of the effect of installment payments on capital constraints, and on auction prices.

E. Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present, By Ivy Planning Group LLC, December 2000 (referred to above and throughout as the "Historical Study")

As noted above, this study provides support for the position that the Commission has a compelling interest in remedying its passive participation in industry-wide discrimination on account of the fact that its current auctions-based initial license assignment policy incorporates discriminatory access to capital requirements, and its past assignment of spectrum licenses to entities known to discriminate against minorities or women. It is also relevant to the analysis of whether the Commission has a compelling interest in promoting competition, universal service, and diversity of viewpoints through minority ownership. Moreover, it is relevant to a narrow tailoring analysis regarding the effectiveness of race- or gender-conscious policies and race-neutral policies on spectrum license awards.

The study examines discrimination in the communications industry, equal employment opportunity, and uneven FCC EEO rules enforcement. It focuses on the importance of industry experience in becoming a spectrum licensee. It surveys a census of minority broadcast and wireless licensees from 1950 to 2000, and a random-sample of non-minorities and market "gatekeepers" such as communications attorneys and media brokers. The conclusion reached by the study is that access to capital is a problem consistently cited by minorities attempting to obtain FCC licenses.

The study presents anecdotal evidence of non-minorities with similar backgrounds to minorities in terms of industry experience and community participation having an easier time than minorities obtaining spectrum license financing. It also details the harassment and pressure experienced by minority owners to present programming distinctly not targeted to minority audiences, including death threats from the KKK to an African-American broadcaster building a station to serve the African-American community. Finally, it describes the numerous hurdles minority broadcasters face in the workplace, and reports on the impact of media consolidation on minority broadcasters.

F. When Being No. 1 is Not Enough: The Impact of Advertising Practices On Minority-Owned and Minority-Formatted Broadcast Stations, By Civil Rights Forum on Communications Policy, January 1999 (referred to above and throughout as the "Advertising Study")

As noted above, this study provides potential support for the assertion of a compelling governmental interest in remedying the FCC's passive participation in industry-wide discrimination and in the license assignment and transfer process, where minority owners with minority audiences earn less revenue, thus making it more difficult to raise the capital necessary to acquire additional licenses. The study identifies a link between advertising industry practices and the capital markets, where equity sources take lower minority revenue into account in financing decisions. Furthermore, the study finds that many general market broadcasters and the firms representing them try to steer advertisers away from minority-formatted broadcasters based on the race or ethnicity of the minority audience.

This study also provides support for the notion that a nexus exists between minority ownership and the airing of minority viewpoints, demonstrating the high correlation between minority ownership and formats targeted to minority audiences.

VI. Summary of Other Relevant Studies

A. Studies Addressing and Documenting the Nexus Between Minority Ownership and Viewpoint Diversity

1. Bachen, Hammond, Mason and Craft, Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming? (1999)

This study provides empirical evidence of a link between the race or ethnicity of broadcast station owners and contribution of broadcast stations to diversity of news and public affairs programming across the broadcast spectrum. The finding is stronger for radio than for television. A link was found for both radio and television between racial and ethnic composition of news room staff and contribution to programming diversity. The study shows that minority ownership and minority presence in the newsroom predicts a greater attention to topics of presumed interest to minority audience members.

The study was designed to examine whether there is a nexus between the race or ethnicity of broadcast licensees and the content of the programming their stations provide. The study also asks whether promoting a greater diversity of racial and ethnic groups among owners creates a greater diversity of programming over the airwaves. Given the First Amendment values behind the diversity rationale, the study focuses on speech that courts have held to be at the core of the First Amendment's protections: news and public affairs programming. In this regard, the study also examines whether the race or ethnicity of station owners affects the quantity of public affairs programming aired by the station, and whether it impacts the likelihood of stations to cover particular issues.

The study finds that minority and ethnic radio station owners were more likely than their non-minority counterparts to program to minority or ethnic audiences, provide news and public affairs information responsive to minority audiences' needs, hire more diverse staffs and tailor national news stories to minority or ethnic community concerns. Rather than seeking to assure the existence of a particular race-based viewpoint on the part of the station owner, what was in fact sought was a sensitivity to and appreciation for minority viewpoints that allowed for their articulation as part of the marketplace of ideas. The research clearly shows that for radio, there is a nexus between minority and ethnic owners' sensitivity to and responsiveness to minority and ethnic audiences, and that such sensitivity and responsiveness is not reflected to a comparable degree in their majority counterparts.

2. Mason, Bachen & Craft, Support For FCC Minority Ownership Policy: How Broadcast Station Owner Race Or Ethnicity Affects News And Public Affairs Programming Diversity, Communication Law and Policy, 2001, Vol. 6, No. 1, Pages 37-73

This article details an investigation of the relationship between the race or ethnicity of broadcast station license-holders and the contribution those stations make to diversity of news and public affairs programming.

The article makes clear that a number of indications support a conclusion that race or ethnicity of a broadcast station's owner has a measurable and meaningful influence on the diversity of programming aired in the markets in which the station operates. The article states that minority-owned radio stations cover more topics presumed to be of interest to ethnic or racial minority audiences. Moreover, the entertainment format for minority-owned stations is geared more toward minority audiences. This emphasis reflects the greater attention paid to these audiences by minority-owned radio stations. For both television and radio, the percentage of minority news and public affairs staff at a station positively correlates with such programming as well.

3. Craft, *Translating Ownership into Action: Owner Involvement and Values at Minority- and Non-Minority-Owned Broadcast Stations* (2002)

Research demonstrating a link between minority ownership of broadcast stations and news and public affairs programming diversity also includes the counter-intuitive finding that owner involvement in station activities is not related to that link. This study concludes that owner involvement affects: (a) the extent to which a station's employees perceive their values to be similar to the values of the station owner and (b) whether the owner is the primary communicator of news values to employees.

This study has implications for efforts to increase minority participation in broadcasting specifically and workforce diversity in journalism more generally. It supports a conclusion that minority owners are more likely to communicate their values to employees and have an impact upon hiring staff with similar values. This conclusion supports, and in turn is bolstered by, the findings contained in the Content/Ownership Study. The study supports the asserted nexus between minority ownership and station programming diversity as manifest in the ability of minority owners to communicate their values to staff who then translate those values into responsive programming.

4. Minneapolis-St. Paul News Coverage of Minority Communities (2002) Study Report, available at http://www.usccr.gov/pubs/sac/mn1203/summ.htm

In 2002, the Minnesota Advisory Committee held a fact-finding meeting to elicit data, perspectives, and opinions about the Twin Cities news coverage of communities of color. Twin Cities residents rely to a large extent on the local news media for their understanding of minority communities. Residents often learn about other races, cultures, and religions through their exposure to local news media. Therefore, the news media play a vital educative role and must pursue this role in a non-stereotypical manner.

According to the study reports, many panelists believed that the local news media lacked ideological balance in their stories. In addition, the committee concluded that the perspectives of communities of color were often not included in news stories. Furthermore, it was clear that diversification of newsrooms and management is vital to improving coverage of communities of color.

The Committee concluded that as the Minnesota's population becomes more diverse the news media will play a vital educative role. The Committee also found that Twin Cities residents rely to a large extent on the local news media for their understanding of minority communities. Residents often learn about other races, cultures, and religions through their exposure to local news media. Therefore, *the news media play a vital educative role* and must pursue this role in a non-stereotypical manner.

However, despite increased diversification of news staff at local newspapers, there is still an absence of greater diversification of management staff at local newspapers, radio and television stations. While the Committee did not make an explicit connection between the absence of management diversification and coverage of minority communities, it did note that: "the coverage of communities of color continues to be compromised because the communities' perspectives are oftentimes not given equal consideration." The strength of the connection should be qualified by the concurrent observation that "[t]he shorter segments of commercial television and radio news broadcasts do not allow for thorough reporting of complex issues." Nevertheless, the Committee did conclude that:

> People of color need to have input regarding what is news in the Twin Cities. In addition to improving the coverage of communities of color, diversifying management may also ease the difficulties local news media experience recruiting and retaining people of color.

This conclusion led the Committee to recommend that:

> Television news directors must pay closer attention to the interests and concerns of communities of color. When given the opportunity to interact and dialogue with community leaders and representatives, television station managers and news directors should participate. Through interaction and dialogue, television news media and communities of color can begin to understand each others' concerns.

5. Joel Waldfogel, Who Benefits Whom in Local Television Markets? The Wharton School University of Pennsylvania and NBER, November 15, 2001

This paper examines the effects of the size and racial composition of local populations on the types of local programming offered, as well as on the welfare of various types of television viewers. It finds that, as in other media, television programming preferences differ sharply between blacks and non-blacks, and between Hispanics and non-Hispanics. The paper shows that the targeting of local programming to minority viewers is much greater in markets with larger minority populations, whereas prime time and national cable programming are, by definition, insensitive to local preference distributions. The authors indicate that the quantity of locally controlled minority-targeted television draws minority viewers to viewing programs. Together, these relationships imply that blacks and Hispanics are better off, in their capacity as television viewers, in markets with larger black and Hispanic populations.

The study concludes that a growing body of evidence shows that, when preferences differ across audience groups, the satisfaction of *local* media consumers depends on the size of their groups' *local* populations. This relationship has been documented in prior research for *local* radio and daily newspaper markets. The study documents that this relationship holds, particularly for blacks, in *local* television markets as well. In particular, the study's authors show that television programming preferences differ sharply between blacks and non-blacks, and between Hispanics and non-Hispanics.

This study supports the assertion that there are indeed minority and/or ethnic programming preferences shared by minority and/or ethnic audiences that are measurably distinct from majority population programming preferences. The study also finds a relationship between the size of the minority or ethnic market and the amount of minority or ethnically-oriented programming presented in the market. That is, as the minority or ethnic population of the area of license grows, the amount of minority or ethnically-oriented programming presented grows. These findings could be viewed as supporting a conclusion that minority and ethnic market demand fueled by population growth is sufficient to drive responsive programming.

6. **Peter Siegelman, Joel Waldfogel, Race and Radio: Preference *Externalities*, Minority Ownership and the Provision of Programming to Minorities (2001),** www.fcc.gov/ownership/roundtable-docs/waldfogel-c.pdf **also published in Advances in Applied Microeconomics, Vol. 10, 2001.**

This study examines the preferences of blacks and Hispanics vs. non-minorities in radio programming. The authors examine stations targeting blacks and Hispanics and find that most are white-owned. They also find, however, that minority ownership increases the net amount of minority-targeted programming aired by a station. Even though most minority-targeted stations are white-owned, markets with more *minority-owned* stations also have more minority-*targeted* stations. Moreover, minority-owned stations add to the total programming available to minority listeners. The study also finds that minority vs. non-minority listeners have very different programming preferences, and that this difference results in an under-provision of programming to blacks and Hispanics. The study finds that the amount of local minority-targeted programming depends on the size of the minority, but not the white, population.

The study also shows that there is a nexus between the race or ethnicity of broadcast licensees and the content of the programming their stations provide. It highlights that most minority owners broadcast in a minority format, providing evidence to counter Justice O'Connor's concern in *Metro Broadcasting* that the FCC's association of minority ownership with minority programming is a stereotype. Moreover, it demonstrates that minority owners make a difference in the amount of minority-targeted programming provided. The study finds that even though most minority-targeted programming is provided by non-minorities, each additional minority-owned station produces roughly one additional net source of minority-targeted programming. This suggests that minority-owned stations do not simply replace white-owned, minority targeted stations, but increase the overall amount of minority-targeted programming. This provides evidence of the link between diversity of racial and ethnic group ownership and greater diversity of programming over the airwaves. It addresses both the compelling interest in promoting minority ownership – promoting viewpoint diversity – and narrow tailoring issues. The study reveals that viewpoint diversity would not simply be achieved through race-neutral programs to promote format diversity or by the free-market. Rather, viewpoint diversity is enhanced by minority ownership, which increases minority programming.

7. Economics of Minority Programming, Steven Wildman, Theomary Karamanis, The Aspen Institute, 1997, available at http://www.aspeninstitute.org/Programt3.asp?bid=560&i+56

This paper analyzes whether the U.S. television industry undersupplies programming that would be beneficial to minorities. It applies an economic model that shows that large blocks of viewers with similar tastes exert inordinate influence on program supply, and make it more profitable for broadcasters and advertisers to serve the large block than an identifiable minority block. The paper goes on to suggest that until the number of outlets or the size of the minority block increases, broadcasters will find it more profitable to show programs targeted at the majority (assuming that minorities will watch majority-oriented programming instead of turning off the tv), than to broadcast to the minority. The paper claims that audience wealth increases this skew where the majority is wealthier and advertisers prefer an audience with more resources to buy products. The paper argues that the paucity of minority programming leads to a lack of information about the effectiveness of such programming, which discourages its production or broadcast. The paper suggests increasing the information available about minority preferences in programming, effectiveness of advertisers messages by group, and product consumption and purchase patterns to increase broadcasters' and advertisers' knowledge and incentives to provide programming to minorities. The paper suggests that minority ownership might not increase minority programming unless minority owners have a comparative advantage in providing minority programming or are willing to earn fewer profits. The paper suggests that non-minority owners can simply hire minority talent to produce programming that will attract minorities, but does not test these hypotheses regarding the difference minority ownership makes. The paper argues for market-based programs to increase minority programming, and notes that minority ownership has grown slowly, so it should not be relied upon to increase minority programming.

This study examines some of the economic incentives that limit diversity of programming. According to the paper, broadcasters have an incentive to target their programming to majorities and limit their programming to minorities to attract larger audiences. This tendency increases when the number of broadcast outlets is small. Moreover, when the number of broadcast outlets increases, minority programming has not increased as the economic model would have predicted. The paper suggests that differences in wealth between minority and non-minority audiences may also explain advertisers' preference for majority programming to wealthier audiences. According to the paper, the size of the majority continues to wield an inordinate influence on programming decisions. This is true even when audiences are aggregated across regions or nationally through cable, satellite or broadcast affiliations.

To develop incentives "narrowly tailored" to increase minority programs, the authors suggest the development of more information about minority audiences, their program tastes, product and service consumption and responsiveness to advertising messages. The authors do not address the information currently available on these preferences, and advertisers' response to that information. The persistence of "No Urban/Spanish dictates" and "minority discounts" in the face of information showing higher minority consumption of certain products and responsiveness to targeted advertising could show that merely increasing market information may not shift programming to minorities, especially where some biased advertisers or broadcasters discount that information. Additionally, broadcasters targeting the majority would have an incentive to argue that advertisers do not need to place ads on minority-oriented stations, where they can argue that some minorities watch their stations, and that their viewers have higher incomes and would be a better advertising "buy." The authors' economic model also suggests that majority-format stations will form first and have more resources because they serve the majority. This may increase their production resources, and ability to attack other competitors, particularly competitors differentiated by the audience they serve.

B. Study Supporting a Compelling Interest in Competition and Diversity of Broadcast Ownership

Ian Ayres and Peter Cramton, Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition, 48 Stan. L. Rev. 761 (1996).

Ayres and Cramton studied the FCC's Regional Narrowband Paging auction for 30 licenses conducted in 1994. The authors conclude that bidding preferences for minority and women-owned small businesses increased competition and auction revenues by 12%, yielding $45 million in additional revenues. In that auction, the FCC allowed small businesses to pay for the licenses through installment payments over 10 years at a favorable interest rate. For ten licenses, businesses controlled by minorities or women, were able to use a 40 percent bidding credit. Small businesses controlled by minorities and women received a 50 percent bidding credit. This created extra competition and induced unsubsidized firms to bid higher because they had fewer licenses for which to compete (the 40% bidding credit effectively set-aside 10 licenses for minority and women-owned firms). It also increased competition because large firms had to compete against minority and women-owned firms with installment payments that "crossed-over" to bid on non-set aside licenses.

This study shows that programs which encourage minority and women-owned business participation can increase competition, and that the market price being paid for these licenses may have been artificially low without that competition. Minorities and women bid up the prices in the "set-aside" block, effectively eliminating any benefit from the 40% bidding credit. However, one minority firm (Insta-check) was able to "cross-over" and acquire a license in the "non-set-aside" block by outbidding a large non-minority-owned firm.

This study demonstrates the importance of FCC programs to reduce access to capital barriers for minorities and women. Ayres and Cramton conclude that even though the bidding credits for minorities and women were "bid away" by the competition within the set-aside block, the availability of bidding credits and installment payments may have encouraged firm formation and funding. The cross-over competition permitted by allowing small firms to use installment payments for any licenses may have been an additional incentive to formation and funding.

This type of competition also occurred in the FCC's comparative hearing applications for broadcast licenses. When incentives were offered for minorities and women, their participation in a broadcast application was a factor considered for all licenses awarded. The Broadcasting Licensing (Logistic Regression) study of FCC comparative hearings found that applications with high minority participation were more likely to face competition, rather than receive a license as an uncontested singleton application. Minority participation in the comparative hearings was also associated with more valuable licenses, as measured by antenna height and signal coverage, which may explain in part the increased competition.

The comparative hearing and regional narrowband license allocation processes also show that when minorities are given an opportunity to compete through programs which consider their participation to be a plus or reduce capital access barriers, competition is increased overall. This indicates that competition has been artificially reduced by capital access barriers or other practices which have limited minority and women-owned firms' access to spectrum licenses.

C. Study Supporting a Compelling Interest in Remedying Industry-Wide Discrimination

Minority-Targeted Programming: An Examination of its Effect on Radio Station Advertising Performance, Kofi A. Ofori, Ofori & Associates, January 2001

This unpublished study (on file at Santa Clara University School of Law with Professor Sandoval) funded by a grant to the National Black Media Coalition analyzes factors that may affect radio station revenues. In five markets with large African-American and Hispanic populations (Miami, Detroit, Houston, Washington, D.C., and New York), it examines